Supreme Court, U.S.
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No. 98-1960

IN THE

# Supreme Court of the United States

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CORTEZ BYRD CHIPS, INC.,

*Petitioner,*

v.

BILL HARBERT CONSTRUCTION COMPANY,
A DIVISION OF BILL HARBERT INTERNATIONAL, INC.,

*Respondent.*

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**On Petition For A Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Eleventh Circuit**

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## REPLY FOR THE PETITIONER

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## REPLY FOR PETITIONER

As the petition demonstrated, this case presents an important and recurring question over which the lower courts are sharply divided. In an opposition filed at the Court's request, respondent does not seriously dispute this demonstration. Not surprisingly, the opposition also fails to advance any persuasive reason for denying certiorari in this case.

1. The petition showed that this case warrants review for three reasons:

(i) there is a widespread and well-recognized conflict among the federal courts of appeals over the proper venue for applications to confirm, vacate or modify arbitration awards (Pet. at 6-10);

(ii) the decision below, which requires such applications to be brought in the district in which the arbitration award was made, conflicts with the text of the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, its structure and purpose, and the efficient administration of justice (*id.* at 10-14); and

(iii) this issue arises frequently and the conflict among the circuits over it creates a danger of duplicative proceedings and conflicting rulings (*id.* at 14-16).

Respondent concedes — as it must — that "the circuits courts of appeals are split" over the question presented by this petition, Opp. at 4, and notably absent from the opposition is any attempt to defend the decision below or dispute that this case presents a recurring issue important to the administration of justice.

2. Respondent's primary argument is that this Court need not resolve the conflict among the circuits because the courts of appeals "may be moving toward consensus" and may therefore resolve the conflict without this Court's intervention. Opp. at 7. This is a desperate argument. As respondent acknowledges, with the important exception of the decision

below, the most recent court of appeals decisions have held the venue provisions of the Federal Arbitration Act to be permissive. *Id.* at 5-6. Thus, respondent's argument is only that the decision below contradicts the conclusion towards which the courts may be progressing.

In addition, respondent fails to offer any evidence supporting its claim that the conflict among the circuits will disappear without this Court's intervention. As respondent concedes (Opp. at 4-5), the conflict as an old one, dating back to at least 1985. *Compare Smiga v. Dean Witter Reynolds, Inc.*, 766 F.2d 698, 706 (2d Cir. 1985) (venue provisions permissive) *with City of Naples v. Prepakt Concrete Co.*, 490 F.2d 182, 184 (5th Cir. 1974) (mandatory). Moreover, respondent cannot point to a single case or commentator suggesting that this long-standing conflict will vanish once parties start filing petitions for rehearing *en banc*. Finally, contrary to respondent's suggestion, the court below did not "invit[e] an application for rehearing *en banc*" (Opp. at 7) by noting that "[t]he Supreme Court has never resolved this conflict." Pet. App. 3a n.3. As petitioner pointed out (Pet. At 6), the Eleventh Circuit was instead inviting this Court to grant certiorari and resolve the conflict among the circuits.

3. Contrary to respondent's representation (Opp. at 7), the Ninth Circuit has had more than ample opportunity to reconsider its interpretation of the Federal Arbitration Act's venue provisions. Since 1968, the Ninth Circuit has issued at least five decisions finding that applications to affirm, vacate or modify an arbitration award must be brought in the district in which the arbitration award was made — including one this year. *See Sir Speedy v. Garber*, No. 97-5562, 1999 WL 10060 at *2 (9th Cir. Jan. 15, 1999) ("[U]nder the Federal Arbitration Act (FAA), venue over petitions to vacate awards is limited to



the district where the award was made.").[1] Moreover, the Ninth Circuit has never suggested that it would change its interpretation if only a petition for rehearing *en banc* were filed.

4. Respondent's claim that the panel below was "powerless" to depart from the Fifth Circuit's decision in the *Prepakt* case (Opp. at 6) is equally without merit. In *Prepakt*, after an action to confirm an arbitration was filed in the district in which the arbitration award was made, the opposing party moved in another district to enjoin the confirmation proceedings. *See* 490 F.2d at 183. When the second district refused to issue an injunction, the Fifth Circuit affirmed. *See* 490 F.2d at 184. As the petition pointed out (Pet. at 7-8), in the Fifth Circuit's view, this decision "does not directly answer the question whether venue under § 9 is mandatory." *Sutter Corp v. P & P Indus., Inc.*, 125 F.3d 914, 1919 (5th Cir. 1997). Had the panel below not found *Prepakt*'s reasoning persuasive, it could have taken the same position. Thus, contrary to respondent's claim, the conflict among the circuits remains vital and is deepening.

5. Although respondent asserts that this case is not an appropriate vehicle for resolving the conflict among the circuits, Opp. at 10, it does not dispute that this case squarely presents the question over which the circuits are split. Instead, respondent contends that "the Alabama district court did not abuse its discretion in declining to defer to the Mississippi

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[1] *See also Feliciano v. Wirth*, No. 88-1565, 1990 WL 119607 at *2 (9th Cir. Aug. 13, 1990); *Sunshine Beauty Supplies, Inc. v. United States District Court*, 872 F.2d 310, 312 (9th Cir. 1989); *Central Valley Typographical Union v. McClatchy Newspapers*, 762 F.2d 741, 744 (9th Cir. 1985); *United States ex rel. Chicago Bridge & Iron Co. v. Ets-Hokin Corp.*, 397 F.2d 935, 938-39 (9th Cir. 1968).

district court." *Id.*[2] In fact, however, the district court never exercised its discretion under the first-filed rule because, as respondent elsewhere acknowledges (*id.* at 2), the court found that it had "*exclusive* authority to adjudicate the action to vacate, modify, or correct the award" in this case. Pet. App. 10a.

Moreover, had the district court refused to transfer this case, it would have abused its discretion. In the Eleventh Circuit, as elsewhere, courts follow the rule that "[i]n absence of compelling circumstances, the court initially seized of a controversy should be the one to decide the case." *Merrill Lynch, Pierce, Fenner & Smith v. Haydu*, 675 F.2d 1169, 1174 (11th Cir. 1982); *see generally* 17 *Moore's Federal Practice* § 111.13[1][o][ii] (3d ed. 1999). As respondent has never suggested any such compelling circumstances here, the district court would clearly have been required under the first-filed rule to transfer this action to the Southern District of Mississippi, where petitioner's request to vacate the arbitration award in this case was first filed. Opp. at 2.

6. Finally, respondent urges this Court to deny certiorari because the question presented "does not affect fundamental rights" and "does not affect the outcome of this case" Opp. at

[2] Respondent also asserts in its recitation of the facts that there is no basis for vacating the arbitration award in this case. Opp. at 2-3. Petitioner, however, alleged that the contract at issue here required a written change order for any upward adjustments, and that the arbitrators disregarded this requirement in awarding respondent an upward adjustment despite the admitted lack of any such order. Answer at 5. Although respondent disputes making such an admission, Opp. at 1 n.1, it cannot dispute that the admission was alleged or that an arbitration award disregarding the terms of the contract is subject to vacatur. *See, e.g., Coast Trading Co. v. Pacific Molasses Co.*, 681 F.2d 1195, 1198 (9th Cir. 1982); *see generally United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960) (noting that an arbitrator's award may be upheld "only so long as it draws its essence" from the contract at issue).



7, 10. This argument sweeps too broadly. Although questions of venue and procedure rarely affect either fundamental rights or the outcome of a case, this Court routinely reviews such questions. *See, e.g., Stewart Org. Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988); *Leroy v. Great Western United Corp.*, 443 U.S. 173 (1979); *Denver & Rio Grande Western R.R. Co. v. Brotherhood of R.R. Trainmen*, 387 U.S. 556 (1967); *Van Dusen v. Barrack*, 376 U.S. 612 (1964); *Norwood v. Kirkpatrick*, 349 U.S. 29 (1955). Thus, the nature of the question presented offers no justification for ignoring the long-standing conflict over it and the problems this conflict creates for the administration of justice.

## CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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